

106TH CONGRESS  
2D SESSION

# H. R. 4749

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to modernize such title and such Code to take into account the evolution of employer-sponsored retirement plans, and to harmonize the requirements of such title and such Code with other Federal and State laws.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 26, 2000

Mr. BOEHNER introduced the following bill; which was referred to the Committee on Education and the Workforce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to modernize such title and such Code to take into account the evolution of employer-sponsored retirement plans, and to harmonize the requirements of such title and such Code with other Federal and State laws.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2       This Act may be cited as the “ERISA Modernization  
3 Act of 2000”.

4 **SEC. 2. PROHIBITED TRANSACTION EXEMPTION FOR ARM’S**  
5 **LENGTH TRANSACTIONS.**

6       (a) AMENDMENTS TO THE EMPLOYEE RETIREMENT  
7 INCOME SECURITY ACT OF 1974.—

8           (1) IN GENERAL.—Section 408(b) of the Em-  
9 ployee Retirement Income Security Act of 1974 (29  
10 U.S.C. 1108(b)) is amended by adding at the end  
11 the following new paragraph:

12           “(14) Any transaction of the type described in  
13 subparagraph (A), (B), (C), or (D) of section  
14 406(a)(1) or in 406(b) (other than a transaction de-  
15 scribed in paragraph (15)) which meets the arm’s  
16 length transaction requirements of subsection (g).

17           (2) ARM’S LENGTH TRANSACTION REQUIRE-  
18 MENTS.—Section 408 of such Act is amended fur-  
19 ther by adding at the end the following new sub-  
20 section:

21           “(g)(1) The arm’s length transaction requirements of  
22 this subsection are met by a transaction described in sub-  
23 paragraph (A), (B), (C), or (D) of section 406(a)(1) if—

24           “(A) such transaction is entered into pursuant  
25 to a written contract or arrangement which includes  
26 the material terms and conditions of such trans-

1       action or transactions of the type of such trans-  
2       action,

3               “(B) such transaction is in the interest of the  
4       plan and its participants and beneficiaries, and

5               “(C) the terms and conditions of such trans-  
6       action, including any direct or indirect compensa-  
7       tion, are at least as favorable to the plan as an  
8       arm’s length transaction would be.

9       “(2) The arm’s length transaction requirements of  
10   this subsection are met by a transaction described in sec-  
11   tion 406(b) if—

12              “(A) such transaction meets the requirements  
13       of paragraph (1), and

14              “(B) prior to the commencement of such  
15       transaction—

16                      “(i) written disclosure of potential conflicts  
17                      of interest associated with the transaction (or  
18                      contemplated transactions of the type thereof),  
19                      including the receipt of direct or indirect com-  
20                      pensation, has been provided to a fiduciary of  
21                      the plan, and

22                      “(ii) the transaction (or contemplated  
23                      transactions of the type thereof) have been pro-  
24                      vided for in the terms of the plan or of a writ-  
25                      ten contract with a fiduciary described in clause

1 (i) that is independent of the person entering  
 2 into the transaction and any of its affiliates.

3 “(3) In any case in which a fiduciary causes a  
 4 plan to enter into a transaction with such fiduciary  
 5 or an affiliate thereof, the arm’s length transaction  
 6 requirements of this subsection are met only if—

7 “(A) such transaction meets the require-  
 8 ments of paragraphs (1) and (2),

9 “(B) such fiduciary or affiliate is engaged  
 10 in the business of entering into transactions of  
 11 such type with the general public, and

12 “(C) such transaction is entered into under  
 13 substantially the same terms and conditions as  
 14 those under which such transactions with the  
 15 general public are entered into.”.

16 (b) AMENDMENTS TO THE INTERNAL REVENUE  
 17 CODE OF 1986.—

18 (1) IN GENERAL.—Subsection (d) of section  
 19 4975 of the Internal Revenue Code of 1986 (relating  
 20 to exemptions from tax on prohibited transactions)  
 21 is amended—

22 (A) in paragraph (14), by striking “or” at  
 23 the end;

24 (B) in paragraph (15), by striking the pe-  
 25 riod at the end and inserting “; or”; and

1 (C) by adding at the end the following new  
2 paragraph:

3 “(16) Any transaction of the type described in  
4 subsection (c)(1) (other than a transaction described  
5 in paragraph (17)) which meets the arm’s length  
6 transaction requirements of subsection (f)(7).”.

7 (2) ARM’S LENGTH TRANSACTION REQUIRE-  
8 MENTS.—Subsection (f) of such section 4975 (relat-  
9 ing to other definitions and special rules) is amended  
10 by adding at the end the following new paragraph:

11 “(7) ARM’S LENGTH TRANSACTION REQUIRE-  
12 MENTS.—

13 “(A) TRANSACTIONS WITH DISQUALIFIED  
14 PERSONS.—The arm’s length transaction re-  
15 quirements of this subsection are met by a  
16 transaction described in subparagraph (A), (B),  
17 (C), or (D) of subsection (c)(1) if—

18 “(i) such transaction is entered into  
19 pursuant to a written contract or arrange-  
20 ment which includes the material terms  
21 and conditions of such transaction or  
22 transactions of the type of such trans-  
23 action,

1 “(ii) such transaction is in the inter-  
2 est of the plan and its participants and  
3 beneficiaries, and

4 “(iii) the terms and conditions of such  
5 transaction, including any direct or indi-  
6 rect compensation, are at least as favorable  
7 to the plan as an arm’s length transaction  
8 would be.

9 “(B) TRANSACTIONS WITH A FIDUCIARY  
10 OR ITS AFFILIATE.—The arm’s length trans-  
11 action requirements of this subsection are met  
12 by a transaction described in subparagraph (E)  
13 or (F) of subsection (c)(1) if—

14 “(i) such transaction meets the re-  
15 quirements of subparagraph (A), and

16 “(ii) prior to the commencement of  
17 such transaction—

18 “(I) written disclosure of poten-  
19 tial conflicts of interest associated  
20 with the transaction (or contemplated  
21 transactions of the type thereof), in-  
22 cluding the receipt of direct or indi-  
23 rect compensation, has been provided  
24 to a fiduciary of the plan, and

1                   “(II) the transaction (or con-  
2                   templated transactions of the type  
3                   thereof) have been provided for in the  
4                   terms of the plan or of a written con-  
5                   tract with a fiduciary described in  
6                   subclause (I) that is independent of  
7                   the person entering into the trans-  
8                   action and any of its affiliates.

9                   “(C) TRANSACTIONS WITH THE FIDUCIARY  
10                  CAUSING THE TRANSACTIONS.—In any case in  
11                  which a fiduciary causes a plan to enter into a  
12                  transaction with such fiduciary or an affiliate  
13                  thereof, the arm’s length transaction require-  
14                  ments of this subsection are met only if—

15                   “(i) such transaction meets the re-  
16                   quirements of subparagraphs (A) and (B),

17                   “(ii) such fiduciary or affiliate is en-  
18                   gaged in the business of entering into  
19                   transactions of such type with the general  
20                   public, and

21                   “(iii) such transaction is entered into  
22                   under substantially the same terms and  
23                   conditions as those under which such  
24                   transactions with the general public are  
25                   entered into.”.

1 (c) EFFECTIVE DATE.—The amendments made by  
 2 this section shall apply with respect to transactions en-  
 3 tered into on or after January 1, 2001.

4 **SEC. 3. DEFINITION OF PARTY IN INTEREST.**

5 (a) AMENDMENTS TO THE EMPLOYEE RETIREMENT  
 6 INCOME SECURITY ACT OF 1974.—Section 3(14) of the  
 7 Employee Retirement Income Security Act of 1974 (29  
 8 U.S.C. 1002(14)) is amended—

9 (1) by striking subparagraphs (A) and (B) and  
 10 inserting the following:

11 “(A) a person who is an administrator, officer,  
 12 counsel, or employee of the plan;

13 “(B) in connection with a transaction described  
 14 in section 406(a), a fiduciary not otherwise described  
 15 in subparagraph (A) who personally directed or ac-  
 16 tively participated in the plan’s entry into such  
 17 transaction;”;

18 (2) in subparagraph (G), by adding “or” at the  
 19 end;

20 (3) by striking subparagraphs (H) and (I) and  
 21 inserting the following:

22 “(H) an officer or director (or an individual  
 23 having powers or responsibilities similar to those of  
 24 officers and directors) of a person described in sub-



1 paragraph (C), (D), (E), or (G), or of the employee  
2 benefit plan.”; and

3 (4) in the matter following subparagraph (I)  
4 (as in effect before the amendments made by this  
5 subsection), by striking “and lower than 10 percent  
6 for subparagraph (H) or (I)”.

7 (b) AMENDMENTS TO THE INTERNAL REVENUE  
8 CODE OF 1986.—Paragraph (2) of section 4975(e) of the  
9 Internal Revenue Code of 1986 (relating to disqualified  
10 person) is amended—

11 (1) by striking subparagraphs (A) and (B) and  
12 inserting the following:

13 “(A) a person who is an administrator, of-  
14 ficer, counsel, or employee of the plan;

15 “(B) in connection with a transaction de-  
16 scribed in subparagraph (A), (B), (C), or (D)  
17 of subsection (c)(1), a fiduciary not otherwise  
18 described in subparagraph (A) of this para-  
19 graph who personally directed or actively par-  
20 ticipated in the plan’s entry into such trans-  
21 action;”;

22 (2) in subparagraph (G), by adding “or” at the  
23 end;

24 (3) by striking subparagraphs (H) and (I) and  
25 inserting the following:

1           “(H) an officer or director (or an indi-  
 2           vidual having powers or responsibilities similar  
 3           to those of officers and directors) of a person  
 4           described in subparagraph (C), (D), (E), or  
 5           (G), or of the plan.”; and

6           (4) in the matter following subparagraph (I)  
 7           (as in effect before the amendments made by this  
 8           subsection), by striking “and lower than 10 percent  
 9           for subparagraph (H) or (I)”.

10          (b) **EFFECTIVE DATE.**—The amendments made by  
 11          this section shall apply with respect to transactions, acts,  
 12          or omissions occurring on or after January 1, 2001.

13          **SEC. 4. STANDARDS FOR ISSUING EXEMPTIVE RELIEF.**

14          (a) **IN GENERAL.**—Section 408(a) of the Employee  
 15          Retirement Income Security Act of 1974 (29 U.S.C.  
 16          1108(a)) is amended—

17                 (1) by striking the third sentence;

18                 (2) by adding “and” at the end of paragraph  
 19                 (1), by striking paragraph (2), and by redesignating  
 20                 paragraph (3) as paragraph (2); and

21                 (3) in the matter following paragraph (3) (as in  
 22                 effect before the amendments made by this sub-  
 23                 section)—

24                         (A) by striking “Before granting” and in-  
 25                         serting the following:

1 “The issuance of an exemption by the Secretary from any  
2 restriction under section 406 or 407(a) does not exempt  
3 a fiduciary who enters into a transaction subject to such  
4 exemption from the fiduciary duties of section 404 with  
5 respect to the plan or any other provision of this Act with  
6 respect to the plan. In any case in which the Secretary  
7 deems it appropriate, before granting”;

8 (B) by striking “shall” each place it ap-  
9 pears and inserting “may”;

10 (C) by inserting “or provide such other no-  
11 tice as the Secretary deems appropriate” after  
12 “pendency of the exemption”;

13 (D) by striking “paragraphs (1), (2), and  
14 (3)” and inserting “paragraphs (1) and (2)”;  
15 and

16 (E) by adding at the end the following new  
17 sentence: “The Secretary may not grant an ex-  
18 emption under this section unless the Secretary  
19 finds that the conditions or requirements set  
20 forth in the exemption are necessary additions  
21 to the existing Federal and State laws and reg-  
22 ulations and the protections they afford to ad-  
23 dress concerns unique to employee benefit  
24 plans.”.

1 (b) EFFECTIVE DATE.—The amendments made by  
2 this section shall apply with respect to transactions occur-  
3 ring on or after January 1, 2001.

4 **SEC. 5. REGULATIONS RELATING TO DEFINITION OF PLAN**  
5 **ASSETS.**

6 (a) IN GENERAL.—Section 401 of the Employee Re-  
7 tirement Income Security Act of 1974 (29 U.S.C. 1101)  
8 is amended by adding at the end the following new sub-  
9 section:

10 “(d)(1)(A) Not later than March 31, 2001, the Sec-  
11 retary shall issue proposed regulations (including proposed  
12 amendments to existing regulations) to provide additional  
13 guidance for the purpose of determining when the assets  
14 of an entity in which an employee benefit plan has invested  
15 will constitute assets of the plan for purposes of this part.

16 “(B) The proposed regulations issued pursuant to  
17 subparagraph (A) shall be subject to public notice and  
18 comment until June 30, 2001.

19 “(C) The Secretary shall issue final regulations pro-  
20 viding the guidance described in subparagraph (A) not  
21 later than September 30, 2001.

22 “(D) Except as otherwise determined by the Sec-  
23 retary, such regulations shall apply only to investments  
24 in an entity made by an employee benefit plan after Sep-  
25 tember 30, 2001. No inference shall be drawn from the

1 preceding sentence with respect to the interpretation of  
2 any existing regulations prior to such effective date.

3 “(2) The Secretary shall ensure that the regulations  
4 issued under paragraph (1)—

5 “(A) are administratively feasible; and

6 “(B) protect the interests and rights of the plan  
7 and of its participants and beneficiaries (including  
8 meeting the requirements of paragraph (3)).

9 “(3) The regulations prescribed by the Secretary pur-  
10 suant to paragraph (1) shall provide—

11 “(A) that an entity in whose assets investment  
12 by an employee benefit plan is not significant will  
13 not be treated as holding the plan assets of such  
14 plan;

15 “(B) that participation by an employee benefit  
16 plan will not be treated as significant unless such  
17 plan owns 25 percent or more of any class of inter-  
18 ests in the entity;

19 “(C) that, for purposes of determining whether  
20 investment by an employee benefit plan in an entity  
21 is significant, interests in the entity which are owned  
22 by other entities that are deemed to hold assets of  
23 employee benefit plans shall be treated as held by  
24 such plans only to the extent proportionate to the in-

1       terests in such entities that are owned by such  
2       plans;

3           “(D) that an entity that has made no invest-  
4       ments, or that has made only short-term invest-  
5       ments pending long-term commitment, shall be per-  
6       mitted to qualify for the exception (as in effect  
7       under existing regulations) from plan asset status as  
8       a ‘venture capital operating company’ on a tentative  
9       basis for purposes of accepting capital contributions  
10      of employee benefit plans for a period not to exceed  
11      30 days prior to the entity’s first investment that  
12      would permit it to qualify as a ‘venture capital oper-  
13      ating company’ pursuant to such exception;

14          “(E) that a startup or other early stage com-  
15      pany is eligible to qualify as an ‘operating company’  
16      for purposes of the definition of a ‘venture capital  
17      operating company’ under the exception described in  
18      subparagraph (D); and

19          “(F) that an entity which, for a prior period,  
20      has not qualified or has failed to qualify for the ex-  
21      ception described in subparagraph (D) may never-  
22      theless qualify for such exception prospectively if it  
23      satisfies the requirements for the exception on a pro-  
24      spective basis.

25      “(4) For purposes of this subsection—

1           “(A) The term ‘existing regulations’ means the  
2 regulations issued under this section which were in  
3 effect immediately before the date of the enactment  
4 of this subsection.

5           “(B) Any reference to an employee benefit plan  
6 includes a reference to any employee benefit plan to  
7 which the existing regulations apply.”.

8           (b) CONFORMING AMENDMENT.—Subsection (f) of  
9 section 4975 of the Internal Revenue Code of 1986 (relat-  
10 ing to other definitions and special rules) (as amended by  
11 the preceding provisions of this Act) is amended further  
12 by adding at the end the following new paragraph:

13           “(9) REGULATIONS RELATING TO DEFINITION  
14 OF PLAN ASSETS.—Section 401(d) of the Employee  
15 Retirement Income Security Act of 1974 shall apply  
16 with respect to regulations issued under this section.  
17 For purposes of this paragraph, references in such  
18 section 401(d) to employee benefit plans shall be  
19 deemed to include references to plans referred to in  
20 this section.”.

○